



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

JUN 16 2017

OFFICE OF ADMINISTRATION
AND RESOURCES MANAGEMENT

Memorandum of Suspension Decision

Nancy Peeler, EPA Case No. 16-0841-03A

Procedural History

On January 17, 2017, the Environmental Protection Agency (EPA) issued a Notice of Suspension (Notice) to Nancy Peeler (the Respondent) to initiate suspension proceedings. The EPA Suspension and Debarment Official (SDO) took this action based on the information contained in an Action Referral Memorandum, dated January 3, 2017, and its attached exhibits (collectively, the ARM) submitted to the SDO by the EPA Suspension and Debarment Division (SDD) counsel.

The Notice advised that the suspension action is based on a complaint filed in the Michigan State Court for the 67th Judicial District, 7th Judicial Circuit charging the Respondent with one count of misconduct in office, in violation of Michigan Compiled Laws (MCL) 750.505; one count of conspiracy – misconduct in office, contrary to 750.157a, in violation of MCL 750.505c; and one count of willful neglect of duty, in violation of MCL 750.478. The Notice suspended Respondent under 2 C.F.R. § 180.700(a) because the allegations, as set forth in the complaint, constitute adequate evidence to suspect an offense under 2 C.F.R. § 180.800(a)(4). The Respondent was also suspended under 2 C.F.R. § 180.700(b) because the Respondent's misconduct, as set forth in the ARM, indicates a lack of business integrity or business honesty that seriously and directly affects the Respondent's present responsibility.¹ The allegations giving rise to a cause for suspension are serious and the Respondent may have potential business relationships or involvement with a program of the Federal Government. There was, therefore, an immediate need to protect the Government's and public's interests pending the completion of legal proceedings.

¹ This cause for debarment set forth in the Notice is listed under 2 C.F.R. § 180.800(d).

On February 19, 2017, the Respondent² submitted information to the EPA to contest her suspension (Respondent Submission 1). The Respondent also requested and received an extension to submit additional information to contest her suspension. On March 22, 2017, the Respondent submitted additional information for the record (Respondent Submission 2). On April 6, 2017, Debarment Counsel submitted a response to Respondent's submissions (SDD Reply). On April 28, 2017, the Respondent submitted additional information to the record (Respondent Submission 3). The Suspension and Debarment Hearing Officer closed the record on May 2, 2017, and provided a decision date of June 16, 2017.

Information in the Record

In determining the adequacy of the evidence to support a suspension, the SDO considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. 2 C.F.R. § 180.705(a). In this matter, the allegations as set forth in the complaint constitute adequate evidence for purposes of the suspension action. 2 C.F.R. §§ 180.705(b), 180.955. The complaint alleges that on or about April 2014 through on or about August 2015, the Respondent did commit misconduct in office, an indictable offense at common law, by willfully and knowingly misleading employees of the Department of Health and Human Services regarding reports of the increase in blood lead levels of children in Genesee County; in violation of her duty to promote and protect the health of the citizens of the County of Genesee, State of Michigan, contrary to MCL 750.505. It is also alleged that Respondent did unlawfully conspire, combine, confederate, and agree together with one another and others, both known and unknown to the People of the State of Michigan, to commit an offense prohibited by law, to wit: Misconduct in Office as alleged in Count 1, contrary to MCL 750.157a. The complaint further alleges that the Respondent did willfully neglect to perform the duty of promoting and protecting the health of the citizens of the County of Genesee, State of Michigan enjoined upon her by the Michigan Public Health Code, MCL 333.5111(1), MCL 333.5111(2)(f) and MCL 333.20531 and the Critical Health Problems reporting Act, MCL 325.71, et seq., contrary to MCL 750.478.

Discussion

Suspension and Debarment are administrative remedies used to shield the Government from individuals and entities who, because of waste, fraud, abuse, noncompliance or poor performance, threaten the integrity of Federally-funded procurement and nonprocurement activities. Suspension and Debarment are not to be used as punishment. Rather, the remedies focus on risk posed by a respondent as a potential contractor, agent/representative of a contractor, participant, or principal under Federal procurement and nonprocurement program activities. Suspension is a preliminary action taken to ensure the integrity of Government awards pending the outcome of an investigation, pending completion of the record regarding the alleged misconduct in legal proceedings, or pending the completion of debarment proceedings.

² The Respondent is represented in this matter by Harold Gurewitz, Gurewitz & Raben, PLC.

Under the Nonprocurement Common Rule (2 C.F.R. Part 180), the Government may take an exclusionary action against any person who has been, is, or may reasonably be expected to be a participant or principal in a covered transaction. 2 C.F.R. § 180.150. An SDO may impose suspension where there exists an indictment for, or other adequate evidence to suspect the commission of an offense or other conduct which, upon completion of an investigation and ensuing legal proceedings, would constitute cause for debarment at 2 C.F.R. § 180.800. See 2 C.F.R. § 180.700(a) and (b). The SDO must also conclude that immediate action is necessary to protect the public interest. See 2 C.F.R. § 180.700(c). Notwithstanding the adequate evidence to suspect a cause for debarment, an SDO may terminate a suspension action if a Respondent can demonstrate that the Respondent has eliminated or reduced to an acceptable level the Government's risk pending the conclusion of an investigation or legal proceedings.

A. Respondent's Participant or Principal Status

The Respondent served as a grant manager or project director for a Department of Health and Human Services grant called Maternal, Infant and Early Childhood Home Visiting. Respondent Submission 1 at ¶ 7. This fact, in and of itself, may be sufficient to establish that the Respondent has been a principal in a covered transaction, regardless of her official job title.³ The ARM also provided information that the Respondent presents a business risk to EPA nonprocurement programs, citing as an example grant funding that EPA has provided to the Michigan Department of Community Health. Based on the Respondent's experience at the Michigan Department of Health and Human Services (a Federal grantee) and Respondent's work experience on a Federal grant, I find that she has been or may reasonably be expected to be a "participant" or "principal" in a covered transaction within the meaning of 2 C.F.R. Part 180, Subpart B, 2 C.F.R. Part 1532, Subpart B and Subpart I, and 2 C.F.R. Part 376 Subpart B and Subpart I.

The authority to take action against any person that has been, is, or may be reasonably expected to be involved in a Federal procurement transaction or a covered transaction is not intended to operate as a limitation on an agency's ability to protect the Government's business interests. The "adequate evidence" standard for a suspension action and "preponderance of the evidence" standard for a debarment action apply to the establishment of causes for a suspension or debarment action and are not applicable to a Federal agency's determination regarding whether a person may be subject to an exclusion. See 2 C.F.R. § 180.150, *cf.* 2 C.F.R. §§ 180.700, 180.850. Agencies have broad authority to take action to protect public programs against any individual or entity that presents a rational business risk to the Government's procurement or nonprocurement programs. Based on the information in the

³ "Principal" is defined as "(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or (b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—(1) Is in a position to handle Federal funds; (2) Is in a position to influence or control the use of those funds; or, (3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction." As a grant manager or project director on a federal grant, the Respondent has been a principal in a covered transaction. Moreover, the Respondent has been an employee of Michigan Department of Health and Human Services, a recipient of federal grant funds.

record for this matter, it is reasonable to conclude the Respondent is a person who may be subject to an exclusion.

EPA has taken this action as lead agency. Lead agency, however, is not a jurisdictional concept, but an administrative coordination process whereby agencies determine which agency is best positioned to act on behalf of the Government. See Sec. 5 of E.O. 12549, "Debarment and Suspension" 51 Fed. Reg. 6371 (February 21, 1986). EPA has acted on behalf of the Government to protect Federal procurement and nonprocurement programs from potential risks presented by the Respondent based on the allegations as set forth in the complaint.

B. Causes for Suspension

1. The Complaint is an "Indictment"

Under 2 C.F.R. § 180.705(b), an indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions. The criminal complaint meets the evidentiary standard to support a suspension action under the regulations governing this administrative proceeding. Indictment means an indictment for a criminal offense, but under the applicable regulations a presentment, information, or other filing by a competent authority charging a criminal offense is given the same effect as an indictment. 2 C.F.R. § 180.955. The Nonprocurement Common Rule allows for the imposition of a suspension pending the conclusion of a legal proceeding in state court.⁴ The filing of a criminal complaint by a duly authorized state prosecutor constitutes a filing by a competent authority charging a criminal offense. In this case, the special prosecutor had the legally delegated or invested authority, capacity, or power to file a criminal complaint and the filing of the complaint initiated the legal proceeding. Moreover, under the Michigan Rules of Professional Conduct, Rule 3.8 "Special Responsibilities of a Prosecutor," prosecutors in criminal cases in the State of Michigan are mandated to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

Although a court has not ruled on whether there is probable cause to support the continued prosecution of the felony counts charged in the complaint, this procedural safeguard will be a part of the criminal proceedings that will ultimately determine the merits of the criminal complaint. The "adequate evidence" to support a suspension need not be the kind necessary for a successful criminal prosecution or a formal debarment. The felony complaint in this case is a charging document filed by a competent authority charging various criminal offenses. Under Michigan law, Ms. Peeler will have the opportunity to challenge the probable cause bases for the charged offenses at a subsequent hearing.⁵ Furthermore, while Michigan law provides a criminal defendant the right to a preliminary examination for felony

⁴ As defined, "legal proceedings" includes any criminal proceeding to which a State is a party. 2 C.F.R. § 180.965.

⁵ The Michigan State Court for the 67th Judicial District, 7th Judicial Circuit is also the proper forum for the Respondent's legal arguments regarding whether the Respondent was or is a "public official" or whether the Respondent violated a "duty enjoined upon [her] by state law." This suspension proceeding is a parallel proceeding and any determinations regarding the Respondent's criminal liability or whether there is a substantial legal or factual basis for the pending criminal charges are outside of the scope of this administrative proceeding.

offenses, this does not mean that a criminal complaint filed by a state prosecutor need not be based on probable cause.⁶ If, after the preliminary hearing, the court should rule against the state and find that the felony offenses are not supported by probable cause, Respondent shall be afforded the opportunity once again to contest the grounds for the suspension, the adequacy of the evidence, and the need for immediate action based on such ruling.⁷

2. Termination of the 2 C.F.R. §§ 180.700(b), 180.800(d) Cause is Warranted

The Respondent has asserted that there is no evidence to support a cause for the Respondent's suspension under 2 C.F.R. §§ 180.700(b), 180.800(d). To support her argument, the Respondent has challenged the evidentiary value of the complaint and provided information and documentation for the record regarding her job classification at the Michigan Department of Health and Human Services and her emails pertaining to childhood blood lead levels and Flint water. See Respondent Submission 2. SDD counsel has relied solely on the complaint to support cause for the Respondent's suspension under 2 C.F.R. §§ 180.700(b), 180.800(d) and has not proffered any information or arguments that would further support a conduct-based cause for the Respondent's suspension. See SDD Reply. Because an indictment or other filing by a competent authority charging a criminal offense only constitutes adequate evidence for causes of suspension under 2 C.F.R. § 180.700(a), the 2 C.F.R. § 180.700(b) cause is subject to factual challenge.

In light of the fact that there is an independent basis for suspending the Respondent under 2 C.F.R. § 180.700(a), 180.800(a)(4) and I would have proceeded to take an action under either 2 C.F.R. § 180.700(a) or (b), no useful purpose would be served by assessing whether a genuine dispute of material fact has been established that would warrant a fact-finding hearing to determine whether there is an additional cause for suspension under 2 C.F.R. §§ 180.700(b), 180.800(d). See *Burke v. United States Environmental Protection Agency*, 127 F. Supp. 2d 235, n. 6 (D.D.C. 2001) (when the agency offers a proper "offense-based" cause for debarment, the court need not evaluate the action's "conduct-based rationale"). Therefore, I hereby terminate the cause for the Respondent's suspension under 2 C.F.R. §§ 180.700(b), 180.800(d).

3. The Allegations Set forth in the Complaint Provide Cause to Suspect the Commission of Any Other Offense Indicating a Lack of Business Integrity or Business Honesty that Seriously and Directly Affects Respondent's Present Responsibility

⁶ The preliminary hearing effectuates a public policy to cease judicial proceedings where there is a lack of evidence by requiring the prosecution to make a showing that probable cause exist. See *People v. Hunt*, 442 Mich. 359, 362 (1993) ("The right to a preliminary examination in Michigan is a creation of statute. There is no federal or state constitutional requirement. *People v. Johnson*, 427 Mich. 98, 103; 398 NW2d 219 (1986); *People v. Hall*, 435 Mich. 599, 603; 460 NW2d 520 (1990). The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. The preliminary examination thus serves the public policy of ceasing judicial proceedings where there is a lack of evidence. *Johnson* at 104-105.").

⁷ The statutory right to a preliminary examination under Michigan law applies to the felony offenses charged in the complaint. This suspension action is also based on one count of willful neglect of duty, in violation of MCL 750.478 (a misdemeanor). Each offense charged in the complaint constitutes an independent basis to suspend under 2 C.F.R. §§ 180.700(a), 180.800(a)(4).

As noted above, the complaint meets the “adequate evidence” standard as an “indictment” under the applicable regulations to support a cause for the Respondent’s suspension under 2 C.F.R. § 180.700(a), 180.800(a)(4). The 2 C.F.R. § 180.700(a), 180.800(a)(4) cause for the Respondent’s suspension is warranted because although the offenses charged are not offenses specifically enumerated in 2 C.F.R. § 180.700(a), 180.800(a)(1)-(3) and there is a reasonable connection between the alleged misconduct and the Respondent’s ability to perform responsibly under a Federal procurement program or nonprocurement program. If, as was charged in the complaint, the Respondent willfully and knowingly misled employees of the Department of Health and Human Services regarding reports of the increase in blood lead levels of children in Genesee County and conspired with others to commit such misconduct in office, Respondent’s conduct indicates a lack of business integrity or business honesty that seriously and directly affects her present responsibility. Moreover, if the Respondent willfully neglected to perform the duty of promoting and protecting the health of the citizens of the County of Genesee, State of Michigan, her present responsibility would similarly be affected. Serious violations of health, safety, or environmental laws and regulations that threaten human health or the environment may give rise to a cause for suspension or debarment where the misconduct presents a risk to Federal procurement or nonprocurement programs.

4. The Notice Adequately Provides for Administrative Due Process

The Notice, which incorporated by reference the ARM and attachments, notified the Respondent for the causes for her suspension, including that her suspension was based on the complaint (an “indictment” or “other filing by a competent authority charging a criminal offense”), in accordance with 2 C.F.R. § 180.715. Due process requires a suspension notice to contain enough information regarding the alleged misconduct to enable a respondent to “get [her] ducks in a row” in order to make a meaningful opposition. ATL, Inc. v. United States, 736 F.2d 677, 686 (Fed. Cir. 1984). The Notice further complied with the applicable regulations governing these proceedings and the Respondent has been afforded the opportunity to present matters in opposition to the allegations as set forth in the complaint and described in the Notice.

The Federal regulations governing notice for a suspension proceeding are not inconsistent with the state law and procedural rules cited by the Respondent. See Respondent Submission 3. Although the preliminary examination “helps to satisfy the [Michigan] constitutional requirement that the defendant ‘be informed of the nature of the accusation’ against [her],” the purpose of the complaint is to provide initial notice of an accusation. People v. Hunt, 442 Mich. 359, 362 (1993); Wayne County Prosecutor v. Recorder’s Court, 119 Mich. App 159, 162 (1982). The Notice met the requirements under the governing regulations and provided the Respondent with sufficient notice and an opportunity to contest the action taken to safeguard the integrity of Federal programs.

C. Immediate Action is Necessary to Protect the Public Interest

In considering whether to continue or terminate a suspension, the decision is based on all information contained in the record. 2 C.F.R. § 180.750. This includes: (1) all information in support of the SDO’s initial decision to suspend the Respondent; (2) any further information and argument presented in

support of, or opposition to, the suspension; and (3) any transcribed record of fact-finding proceedings. As noted above, the Respondent's suspension is based on a complaint filed in Michigan State Court and, as such, fact-finding for the Respondent's cause for suspension under 2 C.F.R. § 180.700(a), 180.800(a)(4) is precluded. The Respondent has submitted information and arguments in opposition to her suspension. In these submissions, the Respondent has challenged the cause for her suspension, but has not demonstrated that she has eliminated or reduced to an acceptable level the Government's risk pending the conclusion of the criminal proceedings.

Decision

To date, legal proceedings are ongoing. Therefore, I find that cause for the Respondent's continued suspension under 2 C.F.R. §§ 180.700(a), 180.800(a)(4) still exists. See 2 C.F.R. § 180.760(a). The Respondent has not demonstrated to my satisfaction that she is presently responsible or has otherwise demonstrated that she has eliminated or reduced to an acceptable level the Government's risk pending the conclusion of the legal proceedings. THEREFORE, there remains a need to protect the Government's and public's interests and the Respondent's suspension under 2 C.F.R. §§ 180.700(a), 180.800(a)(4) is continued pending the conclusion of the legal proceedings.

Reconsideration and Appeal

The Respondent may request that I reconsider this decision for material errors of fact or law that Respondent believes will change the outcome of the matter. 2 C.F.R. § 1532.765. Written petitions for reconsideration should be submitted electronically to Suspension_Debarment@epa.gov and to the Suspension and Debarment Hearing Officer, Lauren Lovett, at lovett.lauren@epa.gov.

Alternatively, the Respondent may appeal this decision to the Director of the EPA Office of Grants and Debarment (OGD). The OGD Director can reverse this decision only where the OGD Director finds that the decision is based on a clear error of material fact or law, or where the OGD Director finds that the SDO's decision was arbitrary, capricious, or an abuse of discretion. 2 C.F.R. § 1532.765(a)(2). A request for review on appeal must be made by written petition within 30 days of your receipt of this decision. *Id.* The request must be in writing; state the specific findings the Respondent believes to be in error; and include the reasons or legal bases for the Respondent's position. 2 C.F.R. § 1532.765(b). The written request should be submitted electronically to the attention of the Director of the EPA Office of Grants and Debarment, Denise Polk, at Suspension_Debarment@epa.gov and to the Suspension and Debarment Hearing Officer, Lauren Lovett, at lovett.lauren@epa.gov.

Dated: JUN 16 2017


Duc H. Nguyen

EPA Suspension and Debarment Official